Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 74-1528.

BOTANY INDUSTRIES, INC. and MICHAEL DAROFF,
Petitioners,

v.

THE FIRST NATIONAL BANK OF BOSTON
and
MAX ROBB, TRUSTEE IN BANKRUPTCY OF BOTANY INDUSTRIES, INC.
and
STATUTORY CREDITORS COMMITTEE OF BOTANY INDUSTRIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

———

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

(a) The Order of the Bankruptcy Court of October 7, 1974 is not reported. It is appended hereto, as it was not included in the Petition (A1).

(b) The Order of the District Court of December 2, 1974 is set forth as Appendix E to the Petition. No Opinion was issued.

(c) The Judgment Order of the Court of Appeals for the Third Circuit is set forth as Appendix C to the Petition. No Opinion was issued, as indicated at 511 F. 2d 1392. A motion for rehearing was denied on March 6, 1975, as set forth in Appendix A to the Petition.

JURISDICTION.

The jurisdictional requisite is adequately set forth in the Petition.

STATUTES AND RULES INVOLVED.

Petitioners draw into question a procedure of court governed by a provision of the Internal Operating Procedures for the United States Court of Appeals for the Third Circuit (Operating Procedure No. Q.5 at 24 of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit):

Q. MOTION PRACTICE.

5. *Motion to Dismiss Appeal.* A motion to dismiss an appeal may be granted by a motion panel. If the motion panel is of the view that the motion for dismissal not be granted, the motion is referred by

order, without decision or without prejudice, to the panel which will determine the appeal on the merits.

Petitioners also allege, and Respondents dispute, that this case involves a provision of the criminal code (Act of June 25, 1948, 62 Stat. 690 (18 U. S. C. § 154)):

> Whoever knowingly acts as a referee in a case in which he is directly or indirectly interested; or
>
> Whoever, being a referee, receiver, custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a bankruptcy proceeding; or
>
> Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so—
>
> Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant.

QUESTIONS PRESENTED.

1. Whether a United States Court of Appeals may summarily affirm a Judgment Order of a lower court.

2. Whether an agent or sub-agent of a trustee in bankruptcy may validly purchase an asset of the bankrupt corporation administered by the agent or sub-agent.

STATEMENT OF THE CASE.

Botany Industries, Inc. ("Botany") is presently in bankruptcy under the jurisdiction and control of the Bankruptcy Court for the Eastern District of Pennsylvania. Its assets are being sold and otherwise liquidated by the Trustee, Max Robb, for the benefit of the estate.

One asset of Botany was all of the issued and outstanding shares of its subsidiary Glenoit Mills, Inc. ("Glenoit"). However, these shares were pledged to, and held by, The First National Bank of Boston (the "Bank"), for itself and as agent for several other financial institutions, as collateral for various loans (R. 7).

The Trustee and the Bank determined to sell the Glenoit stock. Pursuant to Bankruptcy Rule 606(a) an appraisal of the stock was ordered. This appraisal was filed of record with the Bankruptcy Court on March 22, 1974 showing a value of $6,242,260 (R. 38). Of the offers received for the stock, that of Clarence Hafford, Inc. ("Hafford, Inc.") was the highest. It *exceeded* the appraised value of the stock by $495,240, or approximately 8% (R. 16). On August 9, 1974 the Bank and the Trustee therefore applied to the Bankruptcy Court for approval of the sale to Hafford, Inc. (R. 5-10).

Hafford, Inc. is a Delaware corporation, a controlling interest of which is owned by the management of Glenoit (R. 164). Clarence Hafford is the president of Glenoit.

A hearing on the application to sell the stock was scheduled for October 7, 1974 before the Bankruptcy Judge. Notice of the proposed sale and hearing was published in the *Wall Street Journal* (R. 42) and the *Daily News Record* (R. 41) on September 13, 1974, and sent to all Botany creditors on September 26, 1974 (R. 43).

On October 7, 1974 the sale of the stock to Hafford, Inc. was authorized by Order of the Bankruptcy Judge after receiving no higher bids before, or at, the scheduled hearing (A1-A4).

An appeal from the Order was taken to the District Court by Michael Daroff, one of the present petitioners. Botany was not a party to that appeal. A Brief was filed by the present Respondents, and a "Statement of Issues" was submitted by Mr. Daroff. Oral argument was heard on November 27, 1974. On December 2, 1974, an Order was entered in the District Court for the Eastern District of Pennsylvania dismissing Mr. Daroff's appeal with prejudice (Appendix E to the Petition).

An appeal was then taken to the United States Court of Appeals for the Third Circuit, not by Mr. Daroff, who was the appellant below, but by Botany.

The present Respondents filed both a Motion for Immediate Docketing of Appeal, Expedited Decision and Related Relief, and a Motion for Summary Affirmance (A5-A7). These represented the movants' response to what they saw as an appeal, wholly without merit and brought by a party without standing, being used to hinder the sale of the Glenoit stock. Joint answers were filed to both motions by counsel for Botany and Mr. Daroff.

On January 10, 1975 a panel of the Third Circuit ruled on the two motions. The Motion for Summary Affirmance was "referred to merits panel." (A7).

On January 13, 1975 disposition of the case on the merits was listed for February 13, 1975. Both parties then filed briefs and reply briefs directed to the merits.

Oral argument was heard on the morning of February 13, 1975, and that afternoon a Judgment Order issued (Appendix C to the Petition).

ARGUMENT.

I. As Summary Affirmance Was Not Granted Below, There Is No Case or Controversy To Be Decided.

The first of Petitioners' two questions asks "[w]hether or not there is such a *rari avis* as a motion of summary affirmance by a United States Court of Appeals of a Judgment Order of a lower court." Because Petitioners did not brief this issue it is difficult to determine the precise intent of the question. Presumably, however, Petitioners mean to ask whether it is proper for a Court of Appeals to *grant* a motion for summary affirmance of a lower court order.

Although a motion for summary affirmance is not specifically mentioned in either the Federal Rules of Appellate Procedure or the Local Rules of the Court of Appeals for the Third Circuit, it is addressed by the Local Rules of several other Courts of Appeals.[1] An inspection of these Local Rules shows that a motion to dismiss an appeal is generally handled in a similar, or even identical, manner to a motion for summary affirmance. This is not unexpected as the two motions are all but functional equivalents. Where an appeal is frivolous and wholly without merit, it is entirely proper that it be dismissed, *Harkins v. Eldredge*, 505 F. 2d 802 (8th Cir. 1974). In a similar situation, it should likewise be proper to summarily affirm an order of the court below.

Notwithstanding that the Third Circuit Court of Appeals does not have a specific rule addressing motions for summary affirmance, it does have an internal operating procedure covering the analagous motion to dismiss. This

1. § 27(a) of the Rules for the Second Circuit; Rule 8 of the Rules for the Sixth Circuit; Circuit Rule 22 of the Rules for the Seventh Circuit; Rule 9(b) of the Rules for the Eighth Circuit; and Rule 8 of the Rules for the Tenth Circuit.

operating procedure is set forth in full above under "Statutes and Rules Involved." As can be seen, if the motion to dismiss is not to be granted it is referred to the merits panel.

A reading of the Court's order of January 10, 1975 (A7), indicates that Respondents' Motion for Summary Affirmance was *not* granted, but instead was "referred to merits panel," presumably in compliance with Internal Operating Procedure Q.5.

This Court, therefore, should not consider the propriety of a Court of Appeals granting summary affirmance. Any such consideration would necessarily involve an improper advisory opinion, as the Motion was decided in *Petitioners'* favor below, and there is, therefore, no present case or controversy. Furthermore, because the Motion for Summary Affirmance was not granted below, any decision by this Court on the propriety of granting such a motion would not affect the rights of the litigants. This Court is, therefore, without power to render such an opinion. *St. Pierre v. United States*, 319 U. S. 41 (1943).

II. Whether or Not an Agent or Sub-Agent of a Trustee May Purchase the Bankrupt's Assets, the Purchaser Here Was Not Such an Agent or Sub-Agent.

The second question presented by Petitioners raises the issue of who can purchase the assets of a bankrupt corporation, and more specifically, whether "an agent or sub-agent of a trustee in bankruptcy [may] validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee." (Petition at 2).

The record shows that the purchaser, Hafford, Inc., is a corporation controlled by the management of Glenoit. On this level alone, it is clear that Petitioners' question does not relate to the facts. Hafford, Inc. is not, and never

has been, an agent or sub-agent of the Trustee. There is nothing in the record regarding Hafford, Inc. except that it is a corporation, controlled by the Glenoit management, which presented the highest offer for the Glenoit stock.

Perhaps Petitioners confuse Hafford, Inc. with Clarence Hafford, the individual, who is President of Glenoit. Respondents, however, do not rely solely on this legal distinction, for even Clarence Hafford would be a proper purchaser of the Glenoit stock.

The record shows only that Mr. Hafford is an officer of Glenoit, which is a subsidiary of Botany, the bankrupt corporation. He was never appointed by the Bankruptcy Court to serve as an agent or sub-agent. No case cited by Petitioners, or known to Respondents, holds that such an individual either owes a fiduciary duty to creditors of the parent corporation, or is an agent or sub-agent of the trustee of the parent corporation. Nor do any cases indicate that such an individual, much less a corporation he may control, cannot purchase assets of the bankrupt parent. In other words, the conflict between Circuits that Petitioners attempt to create simply does not exist.

Petitioners first cited case is *Wolverton v. Shell Oil Company*, 442 F. 2d 666 (9th Cir. 1971).[2] Even a cursory examination shows that the facts in *Wolverton* are entirely different from those relating to the Glenoit stock sale.

Wolverton affirms an order setting aside a private sale by a trustee in bankruptcy to the bankrupt himself. Although acknowledging that a sale to the bankrupt is not *per se* unlawful, the Court holds that such a sale must be closely scrutinized as it "offers opportunity for skulduggery

2. It should be noted that *Wolverton* was decided by the *Ninth* Circuit, not the *Second* Circuit as cited by Petitioners. Since Petitioners' only other cited case was also decided by the Ninth Circuit, there is even less support than Petitioners would have this Court believe for the proposition that there is a conflict of decision among Circuits.

that make it suspect." *Id.* at 669. As there was no notice to creditors of the sale, nor an order for sale without notice, *Wolverton* holds that the sale was properly set aside. This case bears no relationship to the present facts.

The foundation of *Wolverton* is that the sale was conducted without notice to creditors. All creditors of Botany had written notice of the proposed sale of the Glenoit stock to Hafford, Inc. Furthermore, notice was published in the *Wall Street Journal* and the *Daily News Record*. The Bankruptcy Court in its Order found explicitly that proper notice had been given (A2).

Furthermore, *Wolverton* concerns the sale of assets to the bankrupt himself. In the present case the sale is not to the bankrupt, but to an independent corporation the stock of which is owned by the management of a solvent subsidiary of the bankrupt. The very bases of *Wolverton* are, therefore, simply inapplicable to the present facts.

Petitioners' second case, *Donovan & Schuenke v. Sampsell*, 226 F. 2d 804 (9th Cir. 1955), *cert. den.* 350 U. S. 895 (1955), is also clearly distinguishable. *Sampsell* holds as void the sale of assets to a bankrupt company's president, who had been appointed by order of the Referee as the "exclusive agent and representative of the trustee" *Id.* at 808, and for which services he was authorized to receive payment. In essence, *Sampsell* holds that someone in such a position owes a fiduciary duty to creditors which makes him ineligible as a purchaser of the bankrupt's assets.

The facts clearly distinguish the present case from *Sampsell*. Neither Clarence Hafford nor the purchaser, Hafford, Inc., is president of the bankrupt corporation, Botany Industries, Inc. The record shows only that Mr. Hafford is a member of the management of Botany's solvent subsidiary Glenoit, but as such, he is neither an agent nor representative of the trustee, whether by specific court

order as in *Sampsell,* or otherwise. Petitioners cite no cases that indicate otherwise. Furthermore, neither Mr. Hafford nor Hafford, Inc. have received compensation from the trustee, nor are they authorized to do so. The facts of record simply do not fit the *Sampsell* mold.

A word should also be said concerning 18 U. S. C. § 154, which is referred to in the Petition and set forth above under "Statutes and Rules Involved." This section of the criminal code forbids the purchase by certain parties of the assets of a bankrupt estate. Consideration of this provision, however, is wholly improper, for as pointed out in *Sampsell* itself, a civil case is not the proper forum to decide "the inclusionary and exclusionary limits of the words used in the Act [18 U. S. C. § 154]." 226 F. 2d at 808. Moreover, this statute has not once been raised before in these proceedings. And finally, of course, the statute is inapplicable to the present facts because neither Mr. Hafford nor Hafford, Inc. is "a referee, receiver, custodian, trustee, marshal, or other officer of the court. . . ." 18 U. S. C. § 154.

III. There Is No Important Question of Federal Law.

That there is no important question of federal law at stake is manifestly obvious from the Petition itself. Petitioners cite just two cases, neither of which is factually similar to the present situation. The issue of who may or may not purchase a bankrupt's assets is clearly not one subject to frequent litigation that would benefit from the clarification of a Supreme Court decision.

Respondents respectfully submit that the matter is of little moment nationally, involves no grave question of constitutional law, and is ill founded for consideration by the Supreme Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

July 3, 1975.

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In Bankruptcy No. 72-273.

IN RE

BOTANY INDUSTRIES, INC.,

Bankrupt.

ORDER.

AND NOW, this 7th day of October, 1974, upon consideration of the foregoing application of Max Robb, Trustee in Bankruptcy of Botany Industries, Inc. ("Trustee"), for authority to sell at private sale, free and clear of all liens (including tax liens), claims, encumbrances, demands, security interests and rights of creditors or any other party or person with the exception of and subject to the lien of the pledge in favor of The First National Bank of Boston, et al. ("First Boston") (a Substitution Agreement and Stipulation with the District Director of Internal Revenue Service, Manhattan District, New York, having been approved, or will be presented for approval, by the Court, whereby the capital stock of Glenoit Mills, Inc. and all of its property will be transferred free and clear of all of the tax claims and/or all of the tax liens in favor of the United States, as described in the Substitution Agreement and Stipulation, which Substitution Agreement and Stipulation is incorporated hereby by reference), all of the Trustee's right, title, interest, and equity of redemption, and all of the right, title and interest and equity of re-

demption of Botany Industries, Inc. ("Botany") in and to all of the issued and outstanding capital stock of Glenoit Mills, Inc., and notice of the hearing thereon having been given to all creditors and parties in interest with opportunity to make a better bid and offer for the property, and a hearing having been held thereon before this Court with full opportunity to creditors and parties in interest to object or to make a better bid and offer, and it appearing that a private sale of the Trustee's right, title, interest and equity of redemption, free and clear of liens (including tax liens) and encumbrances for the consideration hereinafter stated, is fair and reasonable and is more than could be realized at a public sale, and it appearing that the joint sale contemplated by the Hafford offer and proposal is commercially reasonable, and it appearing that there is no valid objection to the transfer of the Trustee's right, title, interest and equity of redemption, and to the transfer of the interest of the pledgee, in and to the shares of stock to a purchaser at private sale, and that the approval of the proposed joint sale is in the best interests of creditors, it is

ORDERED AND DECREED:

1. That the offer and proposal of Clarence Hafford, Inc. ("Hafford") to purchase all of the issued and outstanding shares of capital stock of Glenoit Mills, Inc. ("Glenoit"), a copy of which is attached to the foregoing application, is approved and confirmed, and Max Robb, Trustee in Bankruptcy of Botany Industries, Inc. ("Trustee") is hereby authorized and empowered to do and perform all acts and things necessary and proper to carry out all the terms and conditions thereof.

2. Trustee is hereby authorized, empowered and directed, upon receipt of the full consideration of the amount of $250,000.00, to sell, transfer and assign, at private sale, to Hafford, all of his and Botany's right, title, interest and equity of redemption in and to 175 shares of capital stock of Glenoit, being all of the issued and outstanding capital stock thereof, free and clear of all liens (including tax liens), claims, encumbrances, demands, security interests, and rights of the Trustee, and Estate of Botany Industries, Inc. and creditors or any other party or person, with the exception of and subject to the lien of the pledge in favor of The First National Bank of Boston, Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company of America, Massachusetts Mutual Life Insurance Company and The Mutual Benefit Life Insurance Company (hereinafter collectively referred to as "First Boston, et al.").

3. The First National Bank of Boston, pursuant to the provisions of Bankruptcy Rule 306(d), is authorized to consummate the transaction contemplated by the offer and proposal of Hafford in accordance with its terms and conditions, and is herewith authorized to sell, assign and transfer to Hafford the said 175 shares of the capital stock of Glenoit Mills, Inc., free and clear of all liens, claims, encumbrances, demands, security interests and rights of creditors or any other party or person (except for the rights of the Trustee under the Hafford offer and proposal); and the value of the security interest held by The First National Bank of Boston, Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company of America, Massachusetts Mutual Life Insurance Company and The Mutual Benefit Life Insurance Company, is herewith adjudged and determined to be $6,487,500 and the aggregate of their unsecured deficiency claims shall be allowed only to the extent the claims are enforceable for any excess of the claims over such amount.

4. The joint sale contemplated by the Hafford offer and proposal and hereby approved is adjudged to be commercially reasonable and shall constitute a sale of all of the issued and outstanding shares of capital stock of Glenoit Mills, Inc., free and clear of all liens, claims, encumbrances, demands and security interests of any nature whatsoever.

5. The sale of the capital stock of Glenoit Mills, Inc. to Hafford does not include and does not carry with it any claim, right or demand by Glenoit Mills, Inc. against the Estate of Botany Industries, Inc. or any of its subsidiary corporations; nor does the Estate of Botany Industries, Inc. or any of its subsidiary corporations retain any claim, right or demand against Glenoit Mills, Inc. Any and all such claims, rights or demands by Glenoit Mills, Inc. against the Estate of Botany Industries, Inc. or any of its subsidiary corporations or by the Estate of Botany Industries, Inc. or any of its subsidiary corporations against Glenoit Mills, Inc., now or heretofore existing, are herewith canceled and extinguished.

6. This Court herewith retains jurisdiction to adjudicate all claims which may arise between the Trustee and First Boston and Hafford.

7. The Trustee is herewith authorized and directed to invest the proceeds of the sale in interest-bearing certificates of deposit issued by an approved local bank depository or depositories; and to hold same pursuant to the provisions of the Substitution Agreement and Stipulation referred to above, and not to be withdrawn, other than for reinvestment, except upon Order of this Court.

s/ EMIL F. GOLDHABER,
Bankruptcy Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.

January 9, 1975

C. A. Misc. Record No. 75-8002

IN RE: BOTANY INDUSTRIES, INC.,
Bankrupt

BOTANY INDUSTRIES, INC., BANKRUPT,
Appellant

(D. C. No. B-72-273 In Bankruptcy)

Present: ALDISERT, WEIS and GARTH, *Circuit Judges.*

1. Motion by appellees, The First National Bank of Boston ("First Boston"), for itself and as agent for Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company, and Mutual Benefit Life Insurance Company (the "financial institutions"); Max Robb, Trustee in Bankruptcy, of Botany Industries, Inc. ("Trustee"); and The Statutory Creditors

Committee of Botany Industries, Inc., pursuant to Rule 2, 11(d) and 27 F. R. A. P.,

(1) for immediate docketing of appeal,

(2) for reduction of time for transmitting record to the Court of Appeals and for hearing on original record without an appendix,

(3) for reduction of time for filing and service of all briefs, for filing and service by hand, and for typewritten briefs (appellant and appellees to file and serve briefs 10 (ten) days from date of docketing of appeal),

(4) for early argument on the appeal,

(5) for expedited decision on the appeal,

with Exhibits A, B, C, D and E, and Affidavit of Sidney Chait, Esquire, counsel for Max Robb, Trustee in Bankruptcy of Botany Industries, Inc.,

2. Motion by appellees, The First National Bank of Boston ("First Boston"), for itself and as agent for Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company, and Mutual Benefit Life Insurance Company (the "financial institutions"); Max Robb, Trustee in Bankruptcy, of Botany Industries, Inc. ("Trustee"); and The Statutory Creditors Committee of Botany Industries, Inc., for summary affirmance of the Order of Judge John Morgan Davis dated December 2, 1974, dismissing the appeal of Michael Daroff from the Order of Bankruptcy Judge Emil F. Goldhaber dated October 7, 1974, approving the sale of the common stock of Glenoit Mills, Inc., to

Clarence Hafford, Inc., with Exhibits A, B, C and D, and Affidavit of Sidney Chait, Esquire,

in the above-entitled case.

Respectfully,

THOMAS F. QUINN,
Clerk.

enc.
fm

The foregoing motions 1(1)(2)(3) are granted; the Clerk to implement accordingly; motions 1(4)(5) are referred to merits panel.

Motion 2 is referred to merits panel.

By THE COURT,

/s/ ALDISERT,
Circuit Judge.

Dated: January 10, 1975